Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

80-648

No. ——

IN THE

Supreme Court of the United States

OCTOBER 1980 TERM

EUROPEAN TRADE SPECIALISTS, INC. and
KUNZLE & TASIN,
Petitioners

v.

UNITED STATES OF AMERICA, and
THE FEDERAL MARITIME COMMISSION,
Respondents

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT

WILLIAM L. BORDEN
1527 18th Street, N.W.
Washington, D.C. 20036
(202)-223-3455

Attorney of Record
for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

Where the misconduct of an ocean carrier and of a forwarder is alleged to be extreme, entitling a shipper to consequential and punitive damages at common law: --

(a) Is the administrative remedy available to the shipper through the Federal Maritime Commission and the Shipping Act, 1916 an exclusive remedy?

(b) Does the Shipping Act pare down and revise common law concepts of wrong and of liability such that the shipper cannot now obtain relief through the Federal Maritime Commission at all commensurate with the relief which, on the same alleged facts, he might have obtained in a court prior to the year 1916?

TABLE OF CONTENTS [1/]

	Page
Questions presented	1
Table of Authorities	3
Reference to Proceedings Below	4
Statement of Jurisdiction	5
Statutory References	6
Statement of the Case	7
Reasons for Allowance of the Writ	16
Certificate of Service	29

Appendix (separately presented)

Order of U.S. Court of Appeals Denying Petition for Rehearing	i
Judgment of Court of Appeals	iii
Report and Order of the Federal Maritime Commission, March 20, 1979	v
Report and Order on Remand of the Federal Maritime Commission, May 28, 1976	xxiv
Section 16, Shipping Act	lxxv
Section 17, Shipping Act	lxxvi
Section 18, Shipping Act	lxxxvii
Section 22, Shipping Act	lxxxviii
Section 23, Shipping Act	lxxix
46 C.F.R. 510.24 (c), (e), (j)	lxxx

1/ The Hipage Company, Inc., Intervenor, was not included in the caption due to space limitations.

TABLE OF AUTHORITIES
CITED IN BODY OF PETITION

Cases:	Page
Consolo v. FMC, 383 U.S. 607(1966) ..	24,25,26
Port of Boston Marine Terminal Ass'n v. Rederi. Transatlantic, 400 U.S. 62 (1970)	18
Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F. Supp. 940 (1956)	17
Volkswagonwerk v. FMC, 390 U.S. 261 (1968)	21,26

Statutes:

Shipping Act, 1916 (46 U.S.C 901 et seq.)	
Section 16	18,20
Section 17	18,21,22
Section 18(b)(3)	21
Section 22	24
Section 23	23

Regulations:

46 C.F.R. 510.23 (c), (e), (j) ..	23

REFERENCE TO PROCEEDINGS BELOW

The June 3, 1980 Judgment of the U.S. Court of Appeals for the District of Columbia Circuit was entered without opinion, as was that Court's July 22, 1980 Denial of the Petition for Rehearing. Neither is offically reported.

The Federal Maritime Commission orders are as follows:

(a) May 28, 1976 Report and Order on Remand; and

(b) March 20, 1979 Report and Order.

The earlier order is reported at 19 F.M.C. 1148 (1976). The later order is not officially reported at this time.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 3, 1980, and the Denial of the Petition for Rehearing was entered on July 22, 1980.

Jurisdiction is conferred upon the Supreme Court by 28 U.S.C. 1254 (1), which authorizes review of the judgments of the Courts of Appeal by writ of certiorari.

STATUTORY REFERENCES

Shipping Act, 1916 (46 U.S.C. 901 et seq.)

Sections 16, 17, 18(b)(3), 22, and 23

Regulations Issued under Shipping Act:

46 C.F.R. 510.24 (c), (e), and (j)

See Appendix for text of statutes and of regulations.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari involves a maritime quadrangle, to wit: A shipper (European Trade Specialists, Inc., based near Cleveland, Ohio); a consignee (Kunzle & Tasin, a partnership based in Milan, Italy); a common carrier by water subject to the Shipping Act (Prudential-Grace Lines, Inc., with headquarters in New York City); and a forwarder licensed under the Shipping Act (The Hipage Company, Inc., with an office in Norfolk, Virginia).

In February, 1974 the shipper and the consignee filed a complaint with the Federal Maritime Commission ("the Commission") pursuant to Section 22 of the Shipping Act, charging the carrier and the forwarder with violations of Sections 16, 17, and 18(b)(3) of that Act in connection with a shipment of goods from Norfolk, Virginia to Genoa, Italy. Reparation for lost profits and punitive reparation were

sought. Complainants contended, inter alia:

(a) That the shipment was of importance to them as the first shipment exploiting prior sales development effort and opening up a new market for their product in southern Europe;

(b) That their dominant competitor in this product line and in this market had previously obtained a low commodity tariff rate for ocean carriage of the commodity, and they were eligible for the benefit of the same rate;

(c) That the carrier offered to transport their product at the low commodity rate and, in reliance upon such offer and upon the carrier's assurances, they accepted the offer thereby creating a valid and binding contract between themselves and the carrier;

(d) That they advised the forwarder to describe the product as qualifying for the low commodity rate on the bill of lading, and the forwarder received and understood this advice and initially acted to carry it out;

(e) That the carrier objected to the low rate, whereupon the forwarder at the urging of the carrier changed the description on the bill of lading such that the carrier rated the goods as Cargo, N.O.S. (Not Otherwise Specified);

(f) That the carrier charged and collected an amount for freight which was 13 times greater than the amount which ought to have been assessed, and the carrier paid the forwarder as commission an amount which was 13 times greater than the commission which the forwarder ought to have been paid;

(g) That the forwarder (in violation of the Shipping Act and of regulations issued under such Act) never informed the shipper concerning the carrier's objections to the low commodity rate, and the shipper only learned of the high rate actually charged from the consignee after the consignee paid it some eight weeks later;

(h) That junior personnel of the carrier then promised a refund of the difference between

the high rate and the low rate, and they issued a Notice of Correction to the bill of lading changing the freight charge from the one rate to the other;

(i) That top management of the carrier, in bad faith and with actual knowledge of business injury to the shipper and to the consignee, caused a second Notice of Correction to be issued reverting the freight charge back to the high rate;

(j) That no refund was ever made; and

(k) That no further shipment of the commodity in question was ever made to the market in questio the shipper and the consignee deeming their effort to compete in such market to be economically impractical by reason of the high freight charge on the first shipment.

The carrier did not address complainants' contentions that its top management had acted in bad faith, with foreknowledge of consequences. It contended, inter alia, that the high freight

charge was correct and expressly mandated by Section 18(b)(3) of the Shipping Act, and that complainants failed to show that the carrier had ever transported a like cargo over the same ocean route under like circumstances at a different and lower rate (the "competitive relationship" doctrine).

The forwarder contended, inter alia, that it did timely and properly communicate with the shipper and that complainants failed to show that it had ever forwarded a like cargo over the same ocean route under like circumstances but with different treatment of its shipper principals.

The forwarder further contended that, even if it omitted timely and proper communication with the shipper in this instance, the omission was only a single instance and a pattern of such omissions would be required to constitute violation of the Shipping Act and/or regulations issued under that Act.

On May 28, 1976 the Commission upheld

one of its administrative law judges in dismissing Section 16 and Section 17 charges against the carrier and all but one Section 17 charge against the forwarder, on grounds that complainants had failed to meet applicable requirements of the "competitive relationship" doctrine.

The Commission did not address the evidence of bad faith and of foreknowledge of business injury to complainants which they had introduced at hearings in connection with the conduct of carrier top management and which, they argued, denotes Shipping Act violation. The Commission, however, did state:

> " .. we have not ignored [complainants'] underlying theories of common law wrong, but, rather, have attempted to pare them down to activities at least colorably justiciable under the mandates of sections 16, 17 and 18 of the Shipping Act, 1916." (Appendix p. xxxii)

In its May 28, 1976 ruling the Commission remanded to the administrative law judge for rehearing of one Section 17 issue (whether the forwarder timely and properly communicated with

the shipper) and the Section 18(b)(3) issue (whether the cargo was correctly classified and rated for purposes of the freight charge).

On March 20, 1979 the Commission overruled its administrative law judge, holding that the low commodity rate was the correct freight charge. The Commission said:

> "Because the bill of lading description and the good faith of the carrier are irrelevant to this finding of misclassification, we find that Respondent Prudential [the carrier] violated section 18(b)(3). [Citation omitted.] Complainant having paid freight charges in the amount of $2,532.45 and the proper charges being $206.25, we find that Complainant is entitled to reparations in the amount of $2,532.45 from Respondent Prudential, plus interest, at the rate of 6 percent per annum in the amount of $1,038.30." (App. p. xvi, footnote omitted.)

In the same March 20, 1979 ruling, which discontinued the proceeding, the Commission upheld its judge on the Section 17 issue, stating:

> Even assuming, without deciding, that European [the shipper] was not notified of the classification and rating problem we cannot say that such conduct by Hipage [the forwarder] amounts to violation

> of section 17. Unless its normal practice was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. [Citation omitted.] We therefore, need not reach the issue of whether in this case the shipper was so notified." (App. p. xvii; emphasis in original.)

The Commission did not comment on the question of whether "adverse treatment" by the forwarder, if it existed in this case, might sustain a cause of action by the shipper in some other forum.

In its last ruling of March 20, 1979, as in its earlier ruling of May 28, 1976, the Commission did not address the evidence of carrier bad faith and foreknowledge of business injury to complainants.

Their claims that the forwarder had acted as agent-in-fact for the carrier and for itself, and not for its shipper principal, were rejected in the earlier ruling as not fulfilling the "competitive relationship" doctrine. These claims were not mentioned in the later ruling.

Complainants did not at any time during

the proceedings before the Commission introduce evidence as to the actual money extent of the business injury (lost sales development expenses and lost profits) which they experienced; and that say that, pursuant to Commission practice and a ruling of the administrative law judge, they were not at any time permitted to introduce such evidence.

In defining the amount of reparation granted to complainants from the carrier, the Commission did not comment on whether or not evidence of the extent of complainants' business injury would be relevant in the circumstances.

On appeal by the shipper and consignee to the United States Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. 2342-3, the judgment of that Court affirmed the Commission without opinion on June 3, 1980; and the petition of the shipper and consignee for rehearing by the Court was denied without opinion on July 22, 1980.

Their instant petition now follows.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. All roads to relief for this shipper and this consignee led through the Federal Maritime Commission, and the administrative remedy there available appears to be the exclusive remedy in the present state of the statutory and case law.

2. The extent to which, if at all, the Shipping Act re-defines and limits common law concepts of wrong and of liability presents important questions of law warranting consideration in this Court

3. This case furnishes reason to believe that the U.S. Court of Appeals for the District of Columbia Circuit and the Federal Maritime Commission misapprehend in a rather fundamental way the meaning of the reparation provisions of the Shipping Act and the guidance previously furnished by this Court as to such meaning.

4. Aggrieved parties in the maritime community, as illustrated by this case, are without any forum in which they may obtain adequate relief; and exercise of the supervisory powers of this Court is needed.

Discussion

1. The exclusivity of the administrative remedy

If these petitioners had sued the carrier and the forwarder in a court, the suit would likely have been dismissed for failure to exhaust the administrative remedy. See, e.g., Rivoli Trucking Corp. v. New York Shipping Ass'n, 167 F. Supp. 940 (1956).

Alternatively, the suit might have been stayed and the issues referred to the Federal Maritime Commission for resolution as required by the doctrine of primary jurisdiction (this case in all its aspects being one which patently falls within the Commission's sphere of expertise). After the Commission had spoken, the referring

court would have dismissed the suit for want of jurisdiction to review the Commission's decision. Pursuant to 28 U.S.C. 2342 a decision of the Commission may only be questioned in a U.S. Court of Appeals. This is precisely the sequence of procedural steps affirmed in Port of Boston Marine Terminal Ass'n v. Rederi. Transatlantic, 400 U.S. 62 (1970).

Petitioners had effective access to no forum other than the Commission's forum. Thus the view of the Commission and of the Court of Appeals on the extent of the relief available in that forum assumes unique importance to petitioners and to all maritime parties in the position of petitioners.

2. The Shipping Act and the common law

The language of Sections 16 and 17 of the Act confers a mandate on the Commission as sweeping and "constitutional" in scope as the mind of man is capable of devising. This language is full of expansive words such as "undue", "unjust",

"just", and "reasonable". Nothing in the legislative history of the Act hints that the Congress intended it to re-define and limit common law concepts of wrong and of liability.

The wilfull, aggravated misconduct of the carrier and the forwarder in this case, if the evidence of it persuades, plainly is unjust and plainly falls within Shipping Act concepts of wrong and of liability no less than within common law concepts.

The Commission erred in declining to address the evidence of carrier bad faith. It cites no authority for declining. It merely states, in conclusory fashion, that its jurisdiction under the Act requires it to "pare down" the contentions of the shipper and consignee in this respect.

That the Commission was nevertheless troubled by the evidence of carrier bad faith is apparent in several oblique references to it, short of confronting it and ruling on whether or not it persuades. Complainants and all others in their

position were and are entitled to such a ruling.

The classic dereliction of which a forwarder, an agent by Shipping Act definition, can be capable is representation of a third party (the carrier) and of itself at the expense of its true shipper principal. The Commission erred in rejecting this contention of complainants on grounds that a "competitive relationship" had not been shown.

The "competitive relationship" doctrine is pernicious because a shipper, such as the shipper in this case, cannot summon into existence another shipper of a like cargo over the same ocean route under like circumstances. Thus the doctrine may purport to sanction outrageous misconduct on the part of a carrier or forwarder, absent a second shipper twin of the first shipper. (Actually, the doctrine is founded upon a misreading of the "or" in Section 16 First as though it were an "and".)

This Court has recognized the weakness, if not the perniciousness, of the "competitive

relationship" doctrine and all but abolished it in Volkswagenwerk v. FMC, 390 U.S. 261, 280 (1968).

A ruling on the "competitive relatinship" doctrine is not essential to just disposition of this case on appeal, if the petition of the shipper and consignee for a writ were to be granted; for the Commission itself recognized (inconsistently) in its May 28, 1976 ruling that Section 17 may have been violated by the forwarder even though no "competitive relationship" had been shown. And the Commission's ruling that the carrier violated Section 18(b)(3) suffices in itself for just resolution on appeal vis-a-vis the carrier (see infra).

But this case does furnish this Court with an opportunity further to examine the "competitive relationship" doctrine, should the Court deem it fitting to do so in the interests of the maritime community.

In any event, the present case affords the Court opportunity to make clear to the Courts

of Appeal and to the Commission that the Shipping Act does not re-define or limit common law concepts of wrong and of liability -- or if it does, the manner and extent of re-definition and limitation.

3. Misreading of the Act and of this Court's guidance as to the meaning of the Act

Section 17 states that a licensed forwarder subject to the Act, such as the forwarder herein, shall "establish, observe, and enforce just and reasonable ... practices .... " (emphasis supplied). This forwarder did not observe and enforce such practices if it failed promptly to notify and confer with the shipper concerning the objections of the carrier to the low tariff rate, while rewarding itself with a carrier-paid commission 13 times greater in amount than ought to have been paid.

Thus, by the express terms of its own chief enabling statute, the Commission was required to reach the question of whether the forwarder did or did not promptly and properly communicate

with the shipper. In perceiving no need to reach this question, on grounds that only a pattern of forwarder withholding of information from the shipper violates the Act, the Commission dramatized the plight of aggrieved maritime parties in the one and only forum which appears to be available to them.

The same may be said of certain Commission regulations, i.e., 46 C.F.R. 510.23(c), (e), and (j) (formerly known as Commission General Order No. 4). In the most detailed and express manner, as though written with prevision of the alleged facts of this case, these regulations order a forwarder to do that which the shipper and consignee say the forwarder did not do. The Commission again perceived no need to reach the question of whether its regulations were disobeyed, on the same grounds that only a pattern or series of disobediences would constitute violation of the Act under which the regulations were issued.

Section 23 of the Act states that reparation

orders of the Commission "shall be made only after full hearing" (emphasis supplied). In this case there was not a full hearing because complainants did not introduce evidence, and they say they were not permitted to introduce evidence, as to the actual money extent of the business injury which they experienced.

With regard to the meaning of Section 22, this Court furnished guidance in Consolo v. FMC, 383 U.S. 607, 622 (1966) as follows:

> "[Section 22] contemplates that the Commission shall have a certain amount of discretion, but it does not specify what factors are to be considered by the Commission in exercising this discretion. However, we assume that the Commission could validly consider such factors as whether a reparations award would enhance enforcement of the Act, whether the shipper has suffered compensable injury and whether the award of reparations would be consistent with the previous application of the Act, as well as the factor of the culpability of the carrier."

In the case of these petitioners the amount of the reparation awarded enhances disobedience of the Act; for this amount doubtless commands less purchasing power in 1979 dollars than the

same amount in 1972 dollars which the carrier had collected as the freight money, after due adjustment for inflation and the value of 1972 dollars in terms of commercial and compouded interest rates.

That this shipper and this consignee suffered compensable injury is affirmed in Consolo, supra at 624, wherein the Court recognized the importance and "sting of losing expected profits" and added:

> "Such a loss is real and it is certainly compensable under the Shipping Act."

Likewise, since an award of reparation for lost profits was approved in Consolo and in cases there cited, a like award in the instant case of the shipper and consignee would be consistent with the previous application of the Act.

The last factor which this Court assumed in Consolo that the Commission could validly consider is "the factor of the culpability of the carrier". This appears clearly to mean that, where the misconduct of the carrier (and, one infers, the misconduct of the forwarder as another party

subject to the Act) is wilfull and aggravated, the Commission is obliged to consider evidence of wilfullness and aggravation and, if persuaded that these are shown, to award punitive reparation.

In the instant case the Commission exercised more than "a certain amount of discretion", contrary to the guidance of this Court in Consolo, in declining to address wilfullness and aggravation evidence, in ruling without any evidence of the actual extent of business injury, in letting the forwarder go free, and in limiting reparation from the carrier to the difference between the correct and incorrect freight rates.

Further, except for the concurring opinion of one Comissioner in the May 28, 1976 ruling, the Commission and the Court of Appeals showed scant regard for the view of this Court in Volkswagonwerk, supra, that the dictates of the "competitive relationship" doctrine deserve very little weight.

4. The need of maritime parties for assistance

By and large, throughout the economic and commercial life of our society, one who behaves in bad faith or in reckless disregard of the rights of others, with reason to know the consequences or probable consequences, is subject to liability for consequential and punitive damages.

The interpretation which the Court of Appeals and the Commission give to the reparation provisions of the Shipping Act carve out an exception to this general rule. Aggrieved maritime parties, like the shipper and consignee here, appear restricted to one forum; and even if they prove their cause in that forum, they still cannot obtain the relief which in other sectors of economic and commercial life would be forthcoming from the courts and/or administrative agencies.

The Shipping Act, 1916 has been on the statute books for some 64 years. It is time that the meaning of this Act be clarified, and allowance of the writ in this case provides an excellent vehicle to this Court for so doing.

Respectfully submitted,

William L. Borden

William L. Borden

1527 18th Street, N.W.
Washington, D.C. 20036
Telephone: (202)-223-3455

Attorney of Record
for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that today, this 20th day of October, 1980, I have mailed three copies of the foregoing Petition and of the separately presented Appendix by United States mail, first class postage prepaid, to each of the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Brien E. Kehoe, Esquire
General Counsel
Federal Maritime Commission
Washington, D.C. 20573

John B. King, Jr., Esquire
2050 Virginia National Bank Bldg.
One Commercial Place
Norfolk, Virginia 23510

William L. Borden

William L. Borden

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

80-648
No. ——

IN THE

Supreme Court of the United States

OCTOBER 1980 TERM

EUROPEAN TRADE SPECIALISTS, INC. and
KUNZLE & TASIN,
Petitioners

v.

UNITED STATES OF AMERICA, and
THE FEDERAL MARITIME COMMISSION,
Respondents

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

APPENDIX TO PETITION FOR WRIT

WILLIAM L. BORDEN
1527 18th Street, N.W.
Washington, D.C. 20036
(202)-223-3455

Attorney of Record
for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 79-1503 September Term, 1979

European Trade Specialists, Inc.
and Kunzle & Tasin,
Petitioners

v.

The United States of America and
Federal Maritime Commission,
Respondents

Hipage Company, Inc.,
Intervenor

FILED JUL 22 1980

GEORGE A. FISHER
Clerk

BEFORE: Wright, Chief Judge; Wald and Mikva, Circuit Judges

O R D E R

Upon consideration of petitioners' (European Trade Specialists, Inc., et al) petition for rehearing, it is

ORDERED, by the Court, that petitioners'

aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

s/ George A. Fisher

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

[No Opinion]
NO. 79-1503 September Term, 1979

EUROPEAN TRADE SPECIALISTS, INC.
and KUNZLE & TASIN, Petitioners

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION,
Respondents

HIPAGE COMPANY, INC., Intervenor

FILED JUN 3 1980

GEORGE A. FISHER
Clerk

Petition for Review of an Order of the Federal Maritime Commission

Before: WRIGHT, Chief Judge, and WALD and MIKVA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the Federal Maritime Commission and was argued by counsel. While the issues presented occasion no need for an opinion,

they have been accorded full consideration by the court. See Local Rule 13(c).

This court is of the view that the order of the Federal Maritime Commission is supported by substantial evidence, is not arbitrary or capricious, and is otherwise free of reversible legal error.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the order of the Federal Maritime Commission sought to be reviewed herein is hereby affirmed.

Per Curiam

For the Court

s/ George A. Fisher

GEORGE A. FISHER
Clerk

(S E R V E D)
(MARCH 20, 1979)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-8

EUROPEAN TRADE SPECIALISTS, INC., AND
KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC., AND
THE HIPAGE CO., INC.

Prudential-Grace Lines, Inc. found to have violated section 18(b)(3) of the Shipping Act, 1916.

The Hipage Company, Inc., found not to have violated section 17 of the Shipping Act, 1916.

Reparations granted.

William L. Borden for complainants
John B. King, Jr., for respondent The Hipage Company, Inc.
John J. Purcell for respondent Prudential-Grace Lines, Inc.

REPORT AND ORDER

BY THE COMMISSION: (Richard J. Daschbach, Chairman; Thomas F. Moakley, Vice Chairman; Karl E. Bakke, James V. Day and Leslie Kanuk, Commissioners)

PROCEEDINGS

This proceeding arose by complaint of European Trade Specialists, Inc. (European), on behalf of itself as shipper and on behalf of its consignee Kunzle & Tasin (K & T), alleging violations by Prudential-Grace Lines, Inc. (Prudential) and by The Hipage Company (Hipage), an independent ocean freight forwarder of various sections of the Shipping Act, 1916 (46 U.S.C. 901 et seq.). In his Initial Decision, issued July 9, 1975, Chief Administrative Law Judge John E. Cograve (Presiding Officer) concluded that no violations of the Shipping Act had been shown on the record. The Commission affirmed this decision in all respects except for the alleged violation of section 18(b)(3) (46 U.S.C. 817(b)(c)) by Prudential and the alleged violation of section 17 (46 U.S.C. 816) by Hipage, and remanded it to the Presiding Officer for further proceedings. 1/

In his Initial Decision on Remand, served November 2, 1977, the Presiding Officer again found that neither of the Respondents had violated any provision of the Shipping Act. Exceptions to this decision have been filed by Complainants, to which Respondents have replied.

FACTS

The underlying facts of the complaint in this proceeding are set forth in the Commission's Report and Order on Remand and are incorporated herein by reference.[2/] For a further elucidation of the facts of this case, the analysis of the nature of "Roto-Pads" contained in the Initial Decision at 6 (footnotes omitted) and titled "Further Findings of Fact - Section 18(b)(3) Issue" is attached as an Appendix hereto and made a part of this Report.[3/]

INITIAL DECISION

In the instant case the Order on Remand required the Presiding Officer to determine

the proper tariff rate to be applied to the Complainant's commodity. Appropriate consideration was to be given to tariff Item No 1198 (Pads, Scouring, or material therefor), Item No. 0101 (Abrasives, Viz. .... Cloth, NOT in Belt Form or Rolls (Not Pads, Scouring, or Materials Therefor), the Cargo, N.O.S. classification, or any other tariff classification which may be properly considered.

The Presiding Officer, after making a preliminary analysis of the nature of "Roto-Pads", found on the basis of official notice that the commodity shipped was not "abrasive cloth", and that Prudential's Tariff Item No. 0101 was therefore inapplicable. He also found that Item No. 1198 did not apply because the commodity shipped was not "scouring pads". Accordingly, the "Cargo, N.O.S." rating was held to be the applicable classification.

No specific delineation was made of what

Hipage's obligations were under the circumstances of this case. The Presiding Officer found that Hipage did obtain from European additional information necessary to prepare the bill of lading after Lavino Shipping Company had questioned the classification of Roto-Pads as abrasive cloth. He also held that even if it had not, this fact alone would not constitute a violation of section 17 because no continuing practice of Hipage was proven. The Presiding Officer also found no violation of section 510.23(c), (e), and (j) of the Commission's regulations (46 C.F.R. 510.23(c), (e), and (j)).

POSITIONS OF THE PARTIES

In its Exceptions, European alleges that the Presiding Officer erred in: (a) finding that the commodity shipped was not "abrasive cloth"; (b) excluding relevant evidence and including improper evidence under the guise of official notice; (c) taking official notice of his own personal experiences; (d)

misstating one issue as lack of notice of improper description rather than improper rating; (e) finding that the freight forwarder did notify the shipper of the rate change; (f) requiring the shipper to prove its claim by more than a preponderance of evidence; and, (g) not finding the freight forwarder in violation of section 17 due to its alleged violation of section 510.23(c), (e), and (j) of the Commission's regulations.[4/]

Prudential's response to the first three exceptions is that the commodity shipped was not cloth, the Complainant submitted no probative evidence that it was cloth, and, Complainant's own witness admitted that the description the freight forwarder submitted to the carrier indicated it was not cloth. In its reply to the remaining four exceptions Hipage takes the position that: (a) European did not meet its burden of proof on the notice issue; (b) the

testimony and observed demeanor of the witnesses warranted the Presiding Officer finding that notice was in fact given; and (c) even if notice was not given, it was not a violation of section 17 as a matter of law because it was an isolated act.

DISCUSSION AND CONCLUSIONS

Section 18(b)(3)

In determining the proper tariff rate to be applied to the cargo in this proceeding, an objective inquiry into the true nature of the commodity and whether it can be included under a specific tariff item according to the reasonable construction of the tariff language is required. National Cable & Metal Co. v. Am. Hawaiian, 2 U.S.M.C. 474 (1941). While ambiguities should be construed against the carrier, the terms must be given meaning in the sense that they are understood commercially. Raymond International Inc. v. Venezuelan Line, 6 F.M.B. 189 (1961). Additionally, the Presiding Officer is correct

in noting that if no specific commercial meaning has been engrafted onto a term, that term must be construed according to its ordinary meaning. Nix v. Hedden, 149 U.S. 304 (1893).

The commodity here is described as discs made of synthetic material impregnated with abrasives, designed to be used for scrubbing and polishing industrial or institutional floors and marketed under the trade name "Roto-Pads". The Presiding Officer found that Item No. 1198 did not apply and this finding has not been contested. Additionally, no party has proferred that any other item not already considered should apply. The issue is now confined to whether Item No. 0101 or Cargo, N.O.S. is the proper classification.

The parenthetical exclusion in Item No. 0101, i.e., "Not Pads, Scouring or Materials Therefor", corresponds to the description of Item No. 1198. It follows, therefore,

that the parenthetical exclusion in Item 0101 is met upon a finding that Item No. 1198 covering "Pads, Scouring, or material therefor" does not apply. The commodity is clearly in disc form and hence the non-parenthetical exclusion, i.e., not belt or roll form, is met. The material is clearly an abrasive of some sort reducing the entire controversy to the question of whether it can objectively be described as cloth.

The Presiding Officer found that the material was indeed a fabric consisting of bonded synthetic fibers, either nylon or polyester, and that as such it fell within the dictionary definition of cloth. No evidence of any particular commercial meaning of the word "cloth" was proffered. Therefore we can conclude that the material in question is in fact "cloth" unless clear evidence exists that the "ordinary meaning" of the word is more restrictive than the dictionary meaning and would not include the commodity in

question.

There have been instances where it has been found that the "ordinary" or "common" meaning of a term is not consistent with the dictionary meaning and the former should be used for judicial purposes. Himala International v. Fern Line, 3 U.S.M.C. 53 (1948), Nix v. Hedden, supra. However, these cases are rare and involve factual situations where the common usage of a term is at great variance with the technical definition. The adjudicative body deciding the issue is in effect taking official notice of facts of such notoriety that they amount to an objective certainty and are virtually indisputable. See, Annotation 18 ALJ 2d 552. The common meaning of words is something of which courts are bound to take judicial notice, dictionary meaning not being admitted as evidence but only as aids to the memory and understanding of the court. Nix v. Hadden, supra at 3071 However, the taking of judicial official

notice is to be exercised with great caution, care being taken that the requisite notoriety exists, with every reasonable doubt on the subject being "resolved promptly in the negative". Brown, et al. v. Piper, 91 U.S. 37, 43 (1875).

The record here contains evidence proffered by Complainants as to the ordinary meaning of the term "cloth". Three witnesses testified that the material at issue fell within their general understanding of the word "cloth". (Tr. at 25, 184; Ex. at 1-R). No direct evidence was submitted that the material in question was not cloth. Respondents merely argued that the descriptions of the article proffered to the carrier did not indicate that the material was cloth. In finding that the common meaning of cloth did not include the commodity in question, the Presiding Officer relied on his individual experience in purchasing a similar product for his domestic use.

In reviewing the record, we find that, while considerable weight must be given the factual findings of the Presiding Officer, official notice taken to arrive at the restrictive construction of the tariff term in question contravenes the weight of the record evidence. Based on the evidence of record, which includes a sample of the commodity (Ex. 1), the Commission is of the opinion that the commodity at issue does in fact come within the ordinary meaning of the term "cloth", or more precisely "abrasive cloth". Accordingly, we conclude that the commodity in question should have been rated under Item No. 0101 and not the Cargo, N.O.S. classification.

Because the bill of lading description and the good faith of the carrier are irrelevant to this finding of misclassification, we find that Respondent Prudential violated section 18(b)(3). Union Carbide Inter-America v. Venezuelan Line, 17 F.M.C. 181 (1973).

Complainant having paid freight charges in the amount of $2,738.70 and the proper charges being $206.25, we find that Complainant is entitled to reparations in the amount of $2,532.45 from Respondent Prudential, plus interest, at the rate of 6 percent per annum in the amount of $1,038.30.[5/]

Section 17

Even assuming, without deciding, that European was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of section 17. Unless its normal practice was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. Investigation of Certain Practices of Stockton Elevators, 8 F.M.C. 181, 200 (1964). We, therefore, need not reach the issue of whether in this case the shipper was so notified.

Similarly, because any violation of section 510.23 of the Commission's regulations

must be considered in terms of section 17 by operation of the language of the Order on Remand, without a showing of continuing violations of these regulations no section 17 violation can be found.

THEREFORE, IT IS ORDERED, That Complainants, European Trade Specialists, Inc. and Kunzle & Tasin, are granted reparations from Respondent, Prudential-Grace Lines, Inc., in the amount of $2,532.45 plus interest in the amount of $1,038.30; and

IT IS FURTHER ORDERED, That these proceedings be discontinued.

s/ Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

APPENDIX

Further Findings of Fact - Section 18(b)(3) Issue

Complainants admit that the product in

issue is accurately described as "Roto-Pad Abrasive Floor Maintenance Pads". A "Roto-Pad" consists of synthetic fibers, either nylon or polyester, which are chemically bonded to form a fabric or as Complainants would have it, a "cloth" and impregnated with an abrasive. Roto-Pads are in the shape of circles or discs and are designed for use primarily on floor maintenance machines. These machines are in common parlance variously referred to as "polishers", "waxers" or "scrubbers".

"Roto-Pad" is a trade name personally coined by Mr. Bruce A. Meade, President of European Trade Specialists. Mr. Meade felt that, "To some extent it describes that they rotate and that they are a pad in that sense". The pads are also known commercially as "discs", but Mr. Meade thought that "Roto-Discs" didn't sound very good. When asked why he didn't call the articles "Roto Cloth", Mr. Meade responded, "For the same reason

you find cloth is difficult to pronounce, the 'th' sound in most other languages does not exist and is extremely hard to pronounce".

There were five types of Roto-Pads in the shipment in issue. Three types (Fine Polish, Spray Buff, and Red Spray) were designed for polishing or "spray cleaning" and polishing. Two types (Thickline and Blue Spray) were designed according to Complainants for "wet scrubbing". Complainants' sales literature contains the claim of an "EXTRA BONUS" which is obtained by telling the purchasers of Roto-Pads to "punch out the center and [he will] have an excellent scouring pad for those hard to get at places".

FOOTNOTES

1/ Report and Order on Remand, served May 28, 1976, 16 S.R.R. 1031 (1976).

2/ The original complaint alleged numerous Shipping Act violations by both Respondents arising out of a shipment of 1,009 cartons of "Roto-Pads". The shipment was assessed a "Cargo, N.O.S." rate by Prudential after European had been led to believe by International Great Lakes Shipping Company, a wholly-owned subsidiary of Lavino Shipping Company (Prudential's agent), that the lower rate for "Abrasive Cloth" would be applied. As a consequence, European's shipping costs were thirteen times greater than originally expected. Hipage, after having received shipping documents from European indicating the application of an "Abrasive Cloth" classification, allegedly failed to notify European of Prudential's reclassification of the commodity as "Cargo, N.O.S.". European claimed it did not learn of the problem until after the commodity was shipped.

3/ The specific matters that the Commission directed to be determined at the remand hearings were: (a) the true nature of the commodity shipped and the tariff rate which must be applied, and (b) the actions that the freight forwarder was obliged to take to notify the shipper of any confusion and whether or not it did so.

4/ European alleged that Hipage violated 46 C.F.R. 510.23(c), (e), and (j) by:

continuing to involve itself in the transaction without clarifying the classification problem, withholding information concerning the dispute, and not itemizing the ocean freight charges on its invoice to European, as required by Commission's rules.

5/ Interest is computed from April 1, 1972 to February 1, 1979. See, U.S. Borax & Chem. Corp. v Pac. Coast European Conf., 11 F.M.C. 451, 470 n. 28 (1968).

(S E R V E D)
(MAY 28, 1976)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-8

EUROPEAN TRADE SPECIALISTS, INC., AND
KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC., AND
THE HIPAGE CO., INC.

Respondent Prudential-Grace Lines, Inc. found not to have violated sections 16 or 17 of the Shipping Act, 1916;

Respondent The Hipage Company, Inc., found not to have violated section 16 of the Shipping Act, 1916;

Issue remanded for further proceedings with regard to alleged violation of section 18(b) of the Shipping Act, 1916 by respondent Prudential-Grace Lines, Inc.

Issue remanded for further proceedings with regard to alleged violation of section 17 by respondent The Hipage Company, Inc.

William L. Borden for Complainants
John B. King, Jr. for Respondent, The Hipage Company, Inc.
John J. Purcell for Respondent, Prudential-Grace Lines, Inc.

REPORT AND ORDER ON REMAND

BY THE COMMISSION: (Karl E. Bakke, Chairman; Ashton C. Barrett and James V. Day, Commissioners; Clarence Morse, Vice Chairman, concurring) */

PROCEEDINGS

This case arose by complaint of European Trade Specialists, Inc. (hereinafter "European") on behalf of itself as shipper and on behalf of its consignee Kunzle & Tasin (hereinafter "K&T") alleging violations of sections of the Shipping Act, 1916 (the Act) by Prudential-Grace (Prudential) and by the Hipage Co. (Hipage), Complainant's freight forwarder. The Complainant alleged, in summary, that Prudential had violated sections 16, 17 and 18(b) of the Act and that Hipage had violated sections 16 and 17 of the Act.

The claim in this case results from an alleged overcharge by Prudential for freight on a single shipment of goods from Norfolk, Virginia to Genoa, Italy aboard Prudential's

*/ Commissioner Bob Casey not participating.

vessel S.S. LASH ESPANA. In essence, Complainants allege that the carrier, Prudential, misclassified the commodity which made up the cargo and therefore applied an excessive tariff rate in violation of section 18(b)(3) of the Act. In the course of this transaction both the carrier, Prudential, and the forwarder, Hipage, are also alleged to have acted in such a manner as to have violated sections 16 and 17 of the Act.

Following certain procedural maneuvering involving the amendment of the Complaint, controversy as to proper parties, complicated discovery, and disputes related thereto, the case came before Chief Administrative Law Judge John E. Cograve for hearing. Judge Cograve thereafter issued his Initial Decision finding no violations as alleged and dismissing the complaint. Exceptions to his decision and replies thereto were duly filed. This proceeding came before the Commission on those exceptions and on oral argument before

the Commission.

FACTS[1/]

The shipper, European, is a U.S. exporter based near Cleveland, Ohio; its consignee and co-complainant, K&T, is a partnership based in Milan, Italy. International Great Lakes Shipping Company (also known and cited here as "Lavino") of Cleveland was, at the time pertinent, the agent of Prudential, a common carrier by water subject to the Act; Hipage is a freight forwarder licensed by the Commission with its principal offices in Norfolk, Virginia.

In January, 1972, a representative of Lavino met with the President of European to discuss a shipment of certain goods by European from Norfolk to Genoa. At that meeting, the two parties viewed both the commodity to be shipped and certain sales literature regarding the product. This discussion was held to make a tentative determination of the nature of the commodity and its likely

rating under the appropriate tariff.[2/] The commodity was a quantity of discs made of synthetic material impregnated with abrasives and designed to be used on industrial or institutional floors for scrubbing and polishing. The trade name of this commodity was "Roto-Pads".

Notwithstanding the form of the commodity, i.e., pads, the Lavino representative informed European's President that the cargo in question would be rated as "abrasive cloth" under Item 0101 of the Tariff. That item provides for carriage of:

> "Abrasive(s), viz:
>
> * * *
>
> Cloth, NOT in Belt Form or Rolls (Not Pads, Scouring, or Materials Therefor)"

on a weight basis.

Following this meeting, European selected Prudential as its carrier and space was booked upon Prudential's S.S. LASH ESPANA for transport in February, 1972. The booking was con-

firmed, a booking notice was sent to Hipage (selected by European as its forwarder), to Prudential's agents in Norfolk and to Prudential's offices in New York.

Hipage received its copy of the booking notice on January 17, 1972, and, on January 29, 1972, Hipage also received European's "Purchase Order and Shipping Instructions". This document contains an entry entitled "Freight commodity class of goods" in which appeared the statement: "Conference Item 0101, Abrasive Cloth at $122.38 per 2240 lbs". The document also contained a block entitled "description of goods". Here appeared the description: "Roto-Pads ... Polishing Scrubbing".

Based, apparently, upon European's "Purchase Order and Shipping Instructions", Hipage prepared various requisite shipping documents. Among those was the ocean bill of lading on which the cargo was described as "92 cartons of Roto-Pad Abrasive Floor

Maintenance Pads". Upon presentation of this bill of lading to the carrier's agent, the cargo was rated "Cargo, NOS" resulting in a freight charge of $2,738.70 (including a bunker surcharge). Under Tariff Item 0101, described above, the freight charges would have totaled $206.25. This sum is apparently included in the vastly higher "damages" figure sought.

In April, 1972, following shipment and payment by consignees for the transportation, Complainants, Respondents, and their various agents exchanged numerous telephone calls and much correspondaence regarding the alleged overcharge. The result of this activity was the issuance in May, 1972, by Prudential's agent of a Notice of Correction. This Notice corrected the description of the goods from "Roto-Pad Abrasive Floor Maintenance Pads" to "Roto-Pad Abrasive Floor Cloth" (emphasis added) with a corresponding change in applicable rates. However, in June 1972, this

first Notice of Correction was itself corrected by a further Notice which re-instated the "Cargo, NOS" rate but left the description as "cloth".

The circumstances leading to the issuance of the second Notice are far from clear from the record. The Notice itself merely provides:

> "As per telecon with Richard Egloff [of Prudential] June 12, 1972, correction No. 22 cancelled. Correction No 23 to revert charges back as per original issuances [sic] of the bill of lading."

No refund was made at any time.

From these basic facts, Complainants have constructed their allegations of violations of the Shipping Act by Prudential and Hipage. The alleged actions of Respondents and the consequent charges against them read in part as follows:

> "Complainant charges the respondent companies with violations of the Shipping Act ... as well as violations of the laws of contract and the laws governing principal and agent within the context of the Shipping Act as follows:

"A. Respondent Prudential-Grace Lines ... offered to ship the goods under Item 0101 ...

"B. The complainant accepted and acted in reliance upon the offer of shipment.

"E. Respondent Hipage Company prepared the bill of lading on a pre-printed form furnished by respondent Prudential-Grace Lines. The goods were described as "92 Cartons: Roto-Pad Abrasive Floor maintenance Pads", notwithstanding complainant's express instructions that the goods were to be described as "Conference Item No. 0101, Abrasive Cloth ..."

"M. *** The representations of this 'agent' [Hipage] of the interests of its principal in arm's-length dealings with a 'third party', the carrier, resulted in unjust enrichment of the 'third party' to the extent of more than 13 times as much money as the 'third party' had agreed to accept. ***

"The conduct of respondent Prudential-Grace Lines and respondent Hipage Company is integrally intertwined as, respectively, principal in fact and agent in fact. The result of their joint conduct was to defraud and severely injure complainant."

Upon review of all allegations, however, it is clear that the gravamen of these charges is addressed to this Commission in terms of alleged breach by Respondents of such common law principles as duties of agent to principal, common law fraud, detrimental reliance and

unjust enrichment. Only briefly and obliquely do Complainants address the central issues of the alleged violations of sections 16, 17, and 18 of the Shipping Act.

As Judge Cograve made quite clear in his Initial Decision, this Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleadings it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violation of some common law obligation. We have, nonetheless, reviewed the entire record in an attempt to identify with come certainty the particular violations of the Act complained of. Thus, we have not ignored the underlying theories of common law wrong, but, rather, have attempted to pare them down to activities

at least colorably justiciable under the mandates of sections 16, 17 and 18 of the Shipping Act, 1916.

DISCUSSION AND CONCLUSIONS

The Initial Decision in this case addressed violations against the forwarder, Hipage, and the carrier, Prudential, seriatim. In the interest of clarity, we will track that decision and discuss each issue raised on exception to the decision as it arises, insofar as that is possible.

Judge Cograve dealt first with the violations of section 16 alleged to have been perpetrated by Hipage. From the rather unclear allegations contained in Complainants' complaint and brief, Judge Cograve deduced that:

> " ... complainants first charge Hipage with a violation of section 16 ... which makes it unlawful to give any person, locality or description of traffic an undue or unreasonable preference or advantage or to subject the same to some unreasonable prejudice or disadvantage.

> "Complainants' assertion of a violation of section 16 is based solely upon the failure of Hipage to clarify the commodity shipped as Tariff Item 0101. *** It would appear that Hipage originally did prepare a bill of lading with that description but that someone, probably Lavino, as Prudential's agent, questioned the description, and it was changed to Roto-Pad Abrasive Floor Maintenance Pads. Thus, complainants urge, Hipage failed as an agent for the Shipper to 'faithfully' carry out its obligations to its principal. Hipage also violated section 16, it is alleged, because it did not promptly inform its principal European Trade that there was some question as to the proper classification of the goods .... "

In deciding the issue of section 16 violations by Hipage, Judge Cograve points out the difficulty which Complaints' allegations create with respect to a claim which is justiciable under section 16 of the Act. Apparently, Complainants are determined that a breach by an agent of his duty to his principal constitutes, ipso facto, a subjecting of a person or locality to unreasonable prejudice or disadvantage or the giving to another person or locality an undue or unreasonable preference or advantage. In rejecting this theory as totally untenable, Judge Cograve reasoned:

" ... whatever may have been the justiciable derelictions of Hipage under other sections of the Act, the essence of any violation of section 16 is preference or prejudice to one to the advantage or detriment of a similarly situated other."

Complainants repeatedly have sought to support the alleged violations by Hipage of section 16 by claiming that Hipage subjected Complainants to undue prejudice or disadvantage to the advantage of the 3M Company, allegedly a competitor of Complainants in the abrasive pad business. Judge Cograve noted that while Complainants repeatedly attempted to show such preference or advantage to 3M to the detriment of European, they were wholly unable to show that the alleged competitor had ever shipped any cargo whatsoever on Prudential ships, much less the commodity involved here or that Hipage had ever handled any shipments of any sort for 3M. While complainants were able to show that the introduction of Tariff Item 0101 was prompted some years previously at the request

of 3M, the origin of Item 0101 is, as Judge Cograve explained, "irrelevant to this particular case". Whether or not this rate was instigated by 3M would be of relevance only if it could be shown that 3M also shipped a similar commodity to that of Complainant and was assessed that rate while Complainants had been assessed a higher rate.

Undaunted by their inability to show any competitive relationship between themselves and 3M (or any other shipper), Complainants attempt to circumvent the need for a showing of competitive relationship citing Valley Evaporating Co. v. Grace Lines, 14 F.M.C. 16 (1970) for the proposition that no competitive relationship need exist in order for a violation of section 16 to be found. Judge Cograve discussed this case at length in his Initial Decision and, in our opinion, correctly distinguished that case from the present controversy. As Judge Cograve explained, the peculiar facts of the Valley

case were such that: " ... once the Conference had established its criteria [for retaining commodity rates], all shippers were entitled to equal treatment under those criteria whether or not there was a competitive relationship between them". Thus, in that case, when the conference eliminated a certain commodity rate in violation of its own criteria, a violation of section 16 could be made out notwithstanding a lack of competitive relationship among or between shippers.

Complainants cite the holding as creating an "absolute obligation" doctrine which they seek to have applied here. Unfortunately, as Judge Cograve observed:

> " ... complainants are unclear as to just what absolute obligation Hipage was under. As near as can be determined from a rambling and confused brief, the obligation of Hipage was to follow the instructions of European Trade wherever they may lead. Thus, a failure of Hipage to somehow or other see that Lavino and Prudential accepted the classification of Item 0101, in the view of European constituted a violation of section 16."

Unable to accept the allegations of Complainants in this regard, Judge Cograve dismissed the allegation that Hipage had acted in violation of section 16.

Dismissal of this allegation is challenged on exception by Complainants. Their exception is in large measure simply a restatement of the arguments already advanced before the Presiding Officer and properly disposed of by him.

Rather than attempt to paraphrase Complainants' position, we feel compelled to use its own language. Complainants allege that

> "The record shows that Hipage usually represented the interests of the shipper, and not the interests of the carrier; whereas, here, Hipage represented the interests of the carrier, and not the interests of the shipper, by typing the freight rate the carrier wanted contrary to received and understood shipper instructions. ***
>
> "The heart of the charge is that Hipage was under an absolute obligation to represent shipper interests rather [than] carrier interests, and to advise and consult with the shipper before implementing an extortionary freight charge wanted by the carrier. ***

> "Thus complainants take exception to the view of the Initial Decision on Hipage, in relation to section 16. That view is inequitable and contrary to the precedent of the cases which the Decision cites, these cases having ruled that, in circumstances comparable to those obtaining here, a competitive relationship need not be shown."

Hipage replied to this exception specifically and took strong objection to the position of Complainants. Hipage submits that:

> "In order to violate ¶16 of the Act (46 U.S.C. ¶815), it is necessary that Hipage have given an undue or unreasonable preference or advantage to some person, locality or description of traffic or have subjected European Trade Specialists and Kunzel & Tasin to some unreasonable prejudice or disadvantage. As the initial decision ably points out, in order to have a violation of ¶16, there must be a party preferred and a party prejudiced. There was no showing at the hearing that the Hipage Company treated any other shipper differently than it treated Complainants ... "

As to the alleged "absolute obligation" to the shipper which Complainants alleged and reargued, Hipage states:

> " ... it is unclear as to how Hipage could have prevented the carrier from charging the rate that was charged. That ¶16 imposes no such duty [to

prevent a carrier's application of a certain rate] on a freight forwarder is clear. ***

"Under complainants 'absolute obligation' theory, a forwarder would be under an obligation to misdescribe goods if his principal so directed. The Administrative Law Judge discussed in detail the case of Valley Evaporating Co. v. Grace Line, 14 F.M.C. 16 (1970), which is relied on by Complainants to support their absolute obligation theory and succinctly stated why that decision has no application to the present case. The Law Judge's interpretation of Valley Evaporating is correct and Complainants' exceptions in this regard are not well taken."

We conclude that Judge Cograve's denial of the "absolute obligation" claim under these circumstances and the reasons cited by him are proper.

What Complainants are in effect alleging, under color of section 16, is a violation by Hipage of its duty to its principal under the principles of common law. We have no jurisdiction over such a claim. Further, we are of the opinion that were we to espouse the sort of duty allegedly owed by Hipage to its principal compliance by a forwarder

with such a duty could well result, in itself, in a violation of the Shipping Act.

The alleged violation by Hipage of section 17 of the Act is, as Judge Cograve determined, two-fold. First, it is alleged that by its inability to secure classification of the cargo under Item 0101, Hipage "betrayed the shipper" by misdescribing the commodity. Second, Complainant contends that Hipage violated its duty to the shipper under section 17 by failing to apprise the shipper of any dispute or discrepancy as to the rate to be applied to the goods. Even assuming that these charges constitute a proper allegation of wrongdoing under the Shipping Act, Judge Cograve was unable to find that the actions of Hipage were violative of section 17.

As to the first allegation, Judge Cograve cited testimony in the transcript showing Lavino's (the carrier's agent) skepticism as to shipper's desired rating, the subsequent

description of the goods as "Roto-Pads" and the rating of the cargo as "Cargo, NOS". On this basis he concluded that:

> " ... there is no question, even complainants admit, that the description Roto-Pad, Abrasive Floor Maintenance Pads accurately described the commodity shipped. Just where then is the unjust and unreasonable practice engaged in by Hipage? I can find none."

As to the second allegation, Judge Cograve found that when the numerous discussions of possible overcharge were held among the parties some months after shipment, at no time was there any complaint made by European to Hipage regarding the manner in which Hipage had handled the matter or the efforts made by Hipage to clarify and solve the disagreement as to freight charges. Judge Cograve found that the record of this proceeding simply would not allow him to reach any conclusion on the issue of whether Hipage had properly informed its shipper prior to shipment of the discrepancy in the applied rate. Thus, he dismissed the section 17 charge for failure

of Complainants to sustain their burden of proof. As the Presiding Officer himself explained:

> "The record in this case simply will not allow a definitive disposition of this issue. Mr. Ballard of Hipage testified that in the ordinary course of business the shipper would have been contacted and told of the problem. However Mr Meade of European Trade had no recollection of any such call.
>
> "At this point in the hearing, counsel for European Trade requested a continuance for the taking of depositions of European Trade's secretary. The request was opposed. I [Judge Cograve] denied the request on the ground that far from being surprised by the testimony of Mr. Ballard, counsel for European Trade had from the beginning made an issue of the lack of communication from Hipage. The burden of proving its case was upon European Trade. A part of that case was the failure of Hipage to inform European Trade of the dispute over the rate when it first arose. Counsel for European Trace had every opportunity to call any witness he chose, however he elected not to call Mr. Meade's secretary. However, in the interest of fairness I [Judge Cograve] allowed counsel for complainants an opportunity to file with me, after his review of the record, a motion for the taking of depositions. This was to allow complainants an opportunity to establish their surprise on the basis of the record in the case. No such motion was filed. Accordingly,

complainants having failed to prove Hipage had engaged in an unjust or unreasonable practice in the handling of the shipment in question, the charge that Hipage violated section 17 of the Shipping Act is dismissed.

The second allegation also includes, tangentially, a claim by Complainants that the alleged failure of Hipage to inform its shipper of disputes incorporated other derelictions by Hipage. These include, as best we can determine, allegations that Hipage violated section 17 by failing to make an adequate investigation of Complainant's claim following shipment, by failing to conform to its "usual routine" in such cases, and by failing to have published any sort of regulations for the handling by Hipage of such claims. All of these alleged derelictions are said by Complainants to subject them to undue prejudice or disadvantage to the advantage or benefit of another in violation of section 17. Finally, Hipage's alleged failure to have published its own regulations is claimed to be a violation of Commission General

Order 4 applicable to freight forwarders.

Judge Cograve found no evidence satisfactory to him which would justify a finding of a violation of section 17 in any of the respects alleged by Complainants. Complainants have taken exception to this conclusion and each finding on which it is based. We will address each of these exceptions separately.

Complainants take exception to the failure of the Initial Decision to address their contention that Hipage violated Commission General Order 4. Complainants nowhere specified how General Order 4 may have been breached but simply allege this conclusory argument. We have been unable to determine on our own how this claim might be supported and have not been shown a way by Complainants. In fact nothing in the law or in the factual record in this proceeding will support this allegation. Certainly, and if this be the crux of Complainant's charge, there is no

requirement under section 17 of the Act that forwarders publish their regulations and procedures. Nor has this Commission, either in General Order 4 or elsewhere by rule or decision, mandated that a licensed freight forwarder must establish and publish a special body of regulations. We therefore find this exception to be without merit.[3/]

Additionally, Complainants contend that Judge Cograve erred in rejecting their argument that Hipage's failure to abide by its shipper's instructions constituted an unjust and unreasonable practice in violation of section 17 of the Act. Specifically, they take issue with the Presiding Officer's conclusion that:

> "There is no question, even complainants admit, that the description Roto Pad, Abrasive Floor Maintenance Pads accurately described the commodity shipped."

Complainants challenge this finding on the ground that it is "irrelevant and misleading". They urge that the important fact here

is that:

> "Hipage knew the description the shipper wanted. There was a scienter here; for Hipage started to carry out the shipper's wish [citation omitted; emphasis original]. Hipage also knew the description the carrier wanted. Both descriptions were equally accurate. ***
>
> "What did Hipage do? It elected to please the carrier. ***
>
> "This, in the opinion of complainants, is unjust and unreasonable and should move the conscience of the Commission."

In reply to this exception Hipage explains its actions thus:

> "The only source of this information [on which the description was based] was Complainants own shipping documents and sales literature, and this description was not something conjured up by Hipage and Prudential-Grace in an effort to defraud either of Complainants. ***
>
> "The Hipage Company fulfulled its obligation as a forwarder of accurately describing the goods in preparing the bill of lading based on information supplied by the shipper and by accurately describing the commodity did not engage in unreasonable practices within the meaning of section 17 of the Shipping Act."

This Commission, concurring with Judge Cograve and Hipage, finds that there is no evidence in the record of any collusion between Hipage and Prudential. Further, we agree that Hipage properly described the cargo as it is required by the Act to do. The alleged "scienter" seems to us to be irrelevant to a proceeding in which the pivotal issue is simply a determination of the nature of the commodity shipped.

Complainants further allege error in "the implication of the Initial Decision" that Complainants had lodged no complaint with Hipage regarding the handling of this matter of rate classification of the goods. Complainants arge that they did complain to Hipage; that Hipage failed to make an "internal" investigation of this complaint; that Hipage lacked the capability to make a "meaningful" investigation because it kept no record of the employees who handled the case; and that the Shipping Act imposes a duty on forwarders

to provide a reasonable service in response to complaints which was absent here - that absence being a violation of section 17 of the Act.

Since this allegation was not addressed by Hipage, we have painstakingly reviewed the record of this proceeding in this regard and can find no support for Complainant's position. As far as may be ascertained from the record, when Complainants brought their problem to Hipage, Hipage did, in fact, take reasonable steps to intercede on Complainants' behalf with the carrier and the appropriate conference. Reduced to its essentials, this exception only expresses dissatisfaction with Hipage's inability to induce the carrier or conference to change its position on the rating question. We fail to see how this makes out a violation of section 17.

Finally, Complainants take exception to the conclusion of Judge Cograve that Hipage "followed its usual routine" in handling the

alleged misclassification, insisting that the record shows that, in circumstances such as those prevailing here, the usual routine of a forwarder and of Hipage in particular would be to "inform the shipper that the carrier was objecting to proposed tariff classification, and to obtain additional product description from the shipper ... ; but none of this routine did respondent Hipage carry out".

Hipage, in its reply insists that the normal procedures were followed here, adding that:

> "This procedure would include examining the relevant shipping documents in an effort to ascertain a precise description of the goods, communication with the shipper if the steamship company requested additional information in order to properly rate the cargo, and preparation of relevant customs invoices, etc." (Emphasis ours.)

The record developed with respect to this issue is unclear. Whether or not Hipage was obliged to notify the shipper of any confusion, and whether or not it did so, does

not appear. As a result, we are of the opinion that amplification of the actions or inactions involved must be addressed at further hearing before a determination may be made with respect to the alleged violation of section 17. We, therefore, are remanding this issue to the Administrative Law Judge for further hearing with respect to Hipage's obligations and the sequence of events during the relevant times.

In this regard, Complainants also take exception to a statement in the Initial Decision that while Complainants were invited to file a motion to depose certain witnesses, to counter alleged "surprise" testimony offered by respondents' witnesses, "no such motion was filed". The fact is a motion was filed and Judge Cograve ruled against the requested taking of depositions and denied the motion. Complainants never sought reconsideration or Commission review of this ruling. Since the testimony sought by that

motion deals with the activity of Hipage with regard to the alleged violation of ¶17, which issue shall be reheard on remand, we are of the opinion that we need not rule on this exception.

The issues that remain relate to charges against Prudential. We will discuss these in the order determined by Judge Cograve in his Initial Decision.

The first issue raised is the alleged violation by Prudential of section 16 of the Act. Complainants alleged that Prudential discriminated against "persons" in that it:

> (a) ... discriminated in favor of the 3M Company and against the shipper consignee;
>
> (b) ... discriminated in favor of the 3M Company and against shippers' North Carolina manufacturer;
>
> (c) ... discriminated in favor of respondent carrier and against ocean carriers sailing from the Great Lakes and other U.S. ports;
>
> (d) ... discriminated in favor of respondent carrier and against other carriers sailing from Norfolk (emphasis original);

(e) ... discriminated in favor of respondent carrier and against trans-Atlantic air freight carriers; and

(f) ... discriminated in favor of Norfolk forwarders in ports and at airports.

Without going into unnecessary detail, it is sufficient to relate here that Judge Cograve found none of these allegations to be supported either by the record or by the Complainants' arguments. With regard to the charge under (f) above, since Complainants themselves selected Hipage as their forwarder, Judge Cograve found great difficulty in determining how Prudential could have discriminated in favor of a forwarder in the selection of which it had no hand. As for the issues relating to alleged discrimination in favor of 3M Company, Judge Cograve again noted the absence of any showing that Prudential had ever carried any 3M cargo whatsoever (much less the same or similar commodity at issue here) which was given the Item 0101 rating for 3M.

With respect to the alleged self-preference of Prudential, Judge Cograve cited Anglo-Canadian Ship. Co., Ltd. v Mitsui S.S. Co., Ltd., 4 F.M.B. 535 (1955) to show that:

> " ... the Commission expressly excluded from section 16 the concept of 'self-preference', i.e., in this case Prudential would have had to prefer a carrier other than itself to the prejudice of some other carrier, again other than itself."

Judge Cograve therefore dismissed the alleged section 16 violation at to persons on the ground that Complainants had failed to demonstrate on the record any preference by Prudential with respect to other carriers, air carriers or freight forwarders.

Complainants also allege violations by Prudential of section 16 with respect to localities in that Prudential:

> (a) ... discriminated in favor of Minnesota, France, and Italy, where the 3M Company manufactures abrasive cloth, and against North Carolina where shipper's suppliers manufacture abrasive cloth, and
>
> (b) ... discriminated in favor of the State of Virginia, where Norfolk is

located and against other states where other ports and where airports are located.

Addressing these allegations Judge Cograve articulated a failing which typefies Complainants' brief and theory of the case. He stated:

> " ... here again complainants completely misread the law of preference and prejudice under section 16. ... the essence of a violation of section 16 is that two similarly situated interests are treated differently without any justification and except in somewhat special instances there must be a competitive relationship between those two interests. There is no evidence whatsoever in the record that Prudential ever treated any locality any differently than it treated the port of Norfolk and State of Virginia; and as already noted there is no evidence whatsoever that Prudential ever carried any 3M products.
>
> "But complainants fall back on their reading of Valley Evaporating, supra, and what they call the doctrine of 'absolute obligation'."

Once again, Judge Cograve distinguished the Valley case and concluded:

> " ... not only must complainants show that some other interest was preferred to their prejudice, but also that the interest was a competitor. The record is devoid of any such showing. Accordingly the charge that respondent

Prudential violated section 16 is dismissed.

Judge Cograve then addressed the alleged violations by Prudential of section 17 of the Act. Again he felt compelled to express the allegations in Complainants' own words, noting that Complainants alleged that:

> " ... the false assurances of a tariff rate held out by the carrier's sales agents offend section 17 in that:
>
> "(a) They were unjustly discriminatory in favor of the carrier and in favor of 3M Company, and against the shipper and consignee.
>
> "(b) They were unjustly prejudicial (sic) to the shipper as an exporter, as compared with the 3M Company, a foreign competitor in its capacity as a manufacturer of abrasive cloth in France and Italy.
>
> "(c) They were unjust and unreasonable practices, reflective of the absence of just and reasonable regulations and practices."

The allegation of paragraph (a) above was dismissed summarily by Judge Cograve for the obvious reason that:

> "As noted a number of times before, there is no evidence of record that Prudential ever carried any 3M Company products much less aboard the same vessel, etc. as it

carried European Trade's shipment."

The allegation of paragraph (b) above was interpreted by Judge Cograve to refer to the portion of section 17 which makes it unlawful for a common carrier by water in the foreign commerce to charge a rate which is unjustly prejudicial to exporters from the United States as compared to their foreign competitors. On this point, Judge Cograve explained that the words of the Act contemplate two exporters, one from the United States and one a "foreign competitor", both of whom are competing for business at some third country destination. Since the Presiding Officer found that such a situation was not presented here he dismissed the allegation. As he saw it:

> "The charge as framed by complainants is based on competition from 3M Company plants located in Europe (France and Italy). No water carriage of any 3M products is ever alluded to. Just how this situation can bring into play the cited prohibition of section 17 is not made clear nor is it even discussed. It is indeed typical of the many manufactured allegations and arguments

with which complainants' briefs are replete. Accordingly the charge that respondent Prudential was guilty of discrimination or prejudice under section 17 is dismissed."

Under section 17, therefore, there remained to be disposed of only the allegation that Prudential engaged in an unjust and unreasonable practice in that its agent International (Lavino) did not inform Eoropean of its (Lavino's) inability to bind Prudential to the rate initially quoted to Mr. Meade by Lavino. Citing testimony in the transcript, Judge Cograve concluded that Lavino's representative was not conclusive as to the rate applicable and that European's president was thoroughly aware through experience of the inability of an agent to quote an authoritative rating since the Conference and carriers were the final arbiters of the proper rate to be charged Therefore, Judge Cograve concluded that:

"The charge that Prudential through its agent International [Lavino] committed an unjust or unreasonable practice under section 17 of the Act is dismissed."

All of Judge Cograve's conclusions regarding section 16 and section 17 have been challenged on exception by Complainants. Unfortunately, these exceptions do not differentiate between the claims under either section but rather are lumped together. Thus, Complainants again urge that Prudential violated section 17 in that: it held out assurances that the cargo would be rated under Item No. 0101; that Complainant shippers relied on this assurance to their detriment; that Prudential's assurances were not realized when it rated the cargo as "Cargo, NOS"; that this rating made the assurances "false"; and that these "false assurances were unjust and unreasonable within the meaning of section 17". Additionally, Complainants reargue that when Prudential saw the description and tariff commodity classification described by the shipper as shown in the Purchase Order and Export Shipping Instructions, Prudential's failure to comply with these desires

was unjust and unreasonable in violation of section 17.

Clearly, Complainants position on exceptions constitutes nothing more than a reargument of contentions made before Judge Cograve and rejected by him. While the activity sketched by Complainants might conceivably show a contract claim at common law based on "detrimental reliance", it falls short of establishing a violation of section 17 of the Act. Thus, we agree with Judge Cograve's disposition of this argument and accordingly dismiss Complainants exception in the same regard.

Additionally, we know of no requirement under the Shipping Act which obligates the carrier to acquiesce to a particular description of cargo desired by the shipper, particularly when the description desired appears to be inaccurate. The carrier's obligation in general is to rate the goods accurately according to the descriptions available to him.

Finally, Complainants contend that:

> "Complainants sought to use a tariff item which their dominant competitor in the European market for this product, the 3M Company, had prompted into existence. The 3M Company could have used it, but complainants were improperly prevented from using it.
>
> "The import of the Initial Decision is that, absent a 'competitive relationship', Sections 16 and 17 of the Shipping Act offer parties in the position of complainants no remedy. ***
>
> "The Courts and the Commission did not so hold - Port of San Diego, Valley Evaporating, and New York Foreign Freight, cases cited in the Initial Decision ... "

As we have previously stated, we find that Judge Cograve has properly interpreted and distinguished the cases cited and concur in his finding as to the prerequisite showing, under the circumstances of this case, of a competitive relationship in order for the provisions of sections 16 or 17 to apply. Further, absent such a relationship or even with such a relationship, the allegations that 3M Company prompted into existence Item 0101 and "could have used it" are irrelevant

and misleading.

The final allegation by European against Prudential is that Respondent Prudential violated section 18(b)(3) of the Act by classifying the goods shipped as "Cargo, NOS". The essence of this claim is that while Prudential was "prima facie" justified in rating the cargo as it did with only the bill of lading before it, at some later date, when other information became available, Prudential was no longer so justified and the cargo should have been rated under Item 0101. The document on which Complainants rely most heavily in making this argument appears to be the "Purchase Order and Export Instructions"; specifically that portion which instructs the classification of the commodity to be under Item 0101. In short, Complainants urged that the carrier should have been bound by the shippers instructions. Judge Cograve concluded and properly so, however, that: "this is not, of course, the real question under section

18(b)(3). That question was and remains whether Item 0101 was the proper classification under the carrier's tariff".

On this issue Judge Cograve correctly noted that "complainants are caught up in an inconsistency". On one hand, Complainants claim that:

> "Based on the February 20 Bill of Lading description, the shipment was correctly classified, prima facie, as NOS cargo. ***
>
> "Based on that information [the bill of lading] they classified the commodity as NOS, in accord with published tariffs on file with the Commission. Their action did not offend the statute; rather, it implemented the statute."

On the other hand, Complainants went on to argue that once the carrier came into possession of further information such as the purchase order and shipping instructions and sales literature, it should have classified the cargo under Item 0101. As Judge Cograve stated, however, "the difficulty here is that the description used on the bill of lading can be and was constructed from those very documents".

Further, the President of European testified that the description "Roto-Pad Abrasive Floor Maintenance Pads" accurately described the commodity. The only question to be answered, then, with regard to the alleged violation of section 18(b)(3), is whether this commodity should have been rated as "Abrasive(s) Cloth, NOT in Belt form or Rolls (NOT Pads, Scouring or Material therefor)". Judge Cograve concluded that the articles were (1) clearly "pads" rather than cloth, and (2) were scouring pads as so described on Complainants' own sales literature. Therefore, he concluded, the carrier was justified in not applying the Item 0101 rate and no violation of section 18(b)(3) was found.

Complainants took exception to the disposition of the "tariff classification issue". They alleged that:

> "The legal question (not defined or mentioned in the Initial Decision) is whether a shipper such as the one here, to whom the Item 0101 commodity tariff was addressed, could reasonably have understood it to include his product.

The issue as framed is, in the opinion of this Commission, clearly erroneous. The standard for whether or not a cargo is properly rated is only a determination of what the goods transported actually were. There is no "reasonable man" standard as applied to torts at common law. 4/

Complainants seem to realize the inadequacy of this objection under the Shipping Act, since they further argue the merits of the nature of the commodity. In this regard Complainants state that in their view either the "trade name" description or the commodity name description is accurate. Complainants maintain that the commodity description is appropriately rated under Tariff Item 0101 while the "trade name" description is properly rated under the Cargo, NOS rate.

Notwithstanding these statements, Complainants go on to attack the conclusions of Judge Cograve that the product shipped was scouring pads or material therefor; hence

properly excluded from the application of Item 0101. Complainants submit that it was error for the Presiding Officer to focus on shipper sales literature which lauds the value of the removable center plug of the discs as "an excellent scouring pad for those hard-to-get-at places" and concluded therefrom that the entire pad must be for scouring since its center - clearly the same material - was touted as a scouring material.

In challenging this conclusion complainants argue that scouring pads are of the ilk of "S.O.S." pads or "Brillo" pads to be used on pots and pans and that the floor maintenance pads at issue here are not "scouring" pads. Having attempted this distinction between S.O.S pads and the roto-pads at issue here, Complainants lapse into irrelevant argument as to why Judge Cograve was in error. In this connection, they claim that since the shipper could "reasonably" differentiate between its product and kitchen scouring pads:

> "It is obvious that a shipper such as this one, to whom tariff Item 0101 was addressed, would reasonably have understood the exclusion of scouring material as excluding "S.O.S." and "Brillo" and as not excluding his product made of different material and used for a different purpose."

As we have pointed out above, with respect to application of tariff rates under section 18(b)(3), the issue is not "what rate a reasonable person could expect to have applied". The issue for determination is simply what the actual nature of the commodity shipped is and whether or not the proper tariff rate was applied to that commodity. We are of the opinion that Judge Cograve was completely justified in relying upon the shipper's own sales literature and samples of the commodity itself in attempting to determine the true nature of the goods. Having thus made this determination as to the nature of the goods, the next question should involve the propriety of the rate applied to those goods. In this regard, we believe the record of this case to be inadquate.

Upon review of the Respondent Prudential's applicable tariff, it has come to our attention that on the date of shipment Prudential's tariff included a rate applicable to: "Pads, Scouring, or material therefor" which was $45.75 w/m (the contract rate) or $50.30 w/m (non-contract rate).[5/] During the course of the entire proceeding, this rate was neither alluded to nor discussed by any party, nor was it raised sua sponte by the Administrative Law Judge. We are unable to understand this lapse, particularly, if indeed, the commodity shipped was "pads, scouring or material therefo as found by Judge Cograve. This omission regarding an apparently applicable tariff rate indicates a continuing confusion as to the true nature of the goods and the properly applicable tariff rate. If the commodity shipped were "abrasive floor maintenance pads", as described in the bill of lading, we still are unable to determine whether or not the commodit is also "pads, scouring or material therefor".

If the latter, item no. 1198 would clearly seem to be applicable. However, if the former, that item may or may not be applicable. We are of the opinion that resolution of the exact nature of the goods shipped, and therefore the properly applicable rate, requires further evidentiary hearing. We are remanding this matter to the Administrative Law Judge for further hearings limited to the issues of the true nature of the commodity and the tariff rate which must be applied.

We have scrutinized each exception with reference to the record of this case and the Initial Decision rendered. That some specific exceptions have not been individually discussed does not mean that we have not considered them. Some have been subsumed in other exceptions and some are merely restatements of positions taken previously. Each, however, has been considered by us. Where the record permits, we have determined those issues as noted in our discussion of exceptions above. Where the

record is unclear, we have determined that further evidence must be adduced at rehearing and have, therefore, remanded certain issues. Insofar as the record addressed so far in this proceeding is concerned, we conclude for reasons stated above that Judge Cograve's findings and conclusions were proper and well-founded as to all allegations of violations of section 16 of the Shipping Act with respect to the carrier and forwarder and section 17 of the Shipping Act with respect to the carrier.

However, there remain two issues which we are unable to determine on the record of this proceeding. The allegation of Hipage's dereliction in failing to notify the shipper of any disputes as to applicable tariff rates may not be decided on the unclear record before us. We, therefore, have determined to remand this issue in order to clarify the record in this regard.

Additionally, with respect to the alleged violation of 18(b)(3) by Respondent Prudential

we have determined to order further hearing in order to determine the proper tariff rate to be applied to the goods shipped. This determination should include consideration of tariff items no. 1198, no. 0101, the Cargo, NOS rate, and whatever other rates may properly be considered.

Vice Chairman Morse concurring:

I concur in the result but in so doing I find it unnecessary to concur in the statements of the majority that there must be a competitive relationship proved in this type of case to establish a violation of sections 16 and 17, Shipping Act, 1916. Volkswagenwerk v. FMC, 390 U.S. 261, 280 (1968).

s/ Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

(S E R V E D)
(May 28, 1976)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 74-8

EUROPEAN TRADE SPECIALISTS, INC. AND
KUNZLE & TASIN
v.
PRUDENTIAL-GRACE LINES, INC. AND
THE HIPAGE CO., INC.

ORDER ON REMAND

These proceedings having been instituted upon complaint filed under section 22 of the Shipping Act, 1916, and the Commission having this date made and entered its Report containing its findings and conclusions thereon, which Report is made a part hereof by reference:

IT IS ORDERED, That the issues relating to the alleged dereliction of Respondent Hipage Company in failing to notify its shipper of any dispute as to the applicable tariff rate in violation of section 17 of the Shipping

Act, 1916, be and hereby are, ordered to be remanded for further hearing consistent with our Report; and

IT IS FURTHER ORDERED, That the issues relating to the alleged violation of section 18(b)(3) of the Shipping Act, 1916, by Respondent Prudential-Grace be and hereby are remanded for further hearings in order to determine the proper tariff rate to be applied to the cargo at issue with appropriate considerations being given to tariff items No. 1198, No. 0101, the Cargo, N.O.S. rate or any other rates which may be properly considered; and

IT IS FURTHER ORDERED, That those portions of these proceedings determined in our Report and not remanded by this Order for further proceedings be, and hereby are, discontinued.

By the Commission.

s/ Francis C. Hurney

Francis C. Hurney
Secretary

(SEAL)

FOOTNOTES

1/ As a result, in large measure, of a confused and confusing theory of the case held by Complainants, there are many irrelevant facts brought out in the transcript, briefs, discovery and various motions filed by the parties. In order to pare these superfluous matters down to a workable form which is relevant to justiciable charges under the Shipping Act, we have taken certain editorial licenses. No fact material or relevant to the alleged violation of the Act, however, has been omitted.

2/ The applicable tariff is that of the North Atlantic Mediterranean Freight Conference (Tariff No. 10-FMC-3)

3/ If, by this general exception, Complainants refer to a failure by Hipage to inform its principal of any controversy over the shipment in question, we have incorporated that reference in our discussion of the alleged section 17 violation by Hipage. We have considered that action to be justiciable under section 17 and have included that issue in our order on remand

4/ See, e.g., Western Publishing Co., Inc. v. Hapag Lloyd A.G., 13 S.R.R. 16 (1973) and U.S. v. Farrell Lines, Inc., 13 S.R.R. 199 at 203-204 (1973).

5/ Item No. 1198, 19th Rev. p. 94, No. Atl. Mediterranean Fr. Conf. Tariff No. 10-FMC-3.

Section 16, Shipping Act, 1916 (46 U.S.C. 815)

" ***

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly--

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever ....

" *** "

Section 17, Shipping Act, 1916 (46 U.S.C. 816)

"No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

" ***

"Every such carrier and every other person subject to this chapter shall establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property .... "

Section 18(b)(3), Shipping Act, 1916 (46 U.S.C. 817)

"No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time .... "

Section 22, Shipping Act, 1916 (46 U.S.C. 821)

"Any person may file with the Federal Maritime Commission a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby .... The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation."

Section 23, Shipping Act, 1916 (46 U.S.C. 822)

"Orders of the Commission relating to any violation of this chapter or to any violation of any rule or regulation issued pursuant to this chapter shall be made only after full hearing, and upon a sworn complaint .... "

46 C.F.R. 510.24 (c), (e), and (j)

"(c) A licensee who has reason to believe that a principal ... has made any error or misrepresentation in ... any export declaration, bill of lading, affidavit, or other paper which the principal executes in connection with such shipment, shall advise his principal promptly of the suspected ... error, misrepresentation ... and shall decline to participate in such transaction involving such document until the matter is clarified."

"(e) No licensee shall withhold information relative to a forwarding transaction from his principal."

"(j) Every licensee shall use invoices or other forms of billing which state separately as to each shipment: (1) The actual amount of ocean freight assessed by the oceangoing common carrier .... "

Supreme Court, U. S.
FILED
DEC 5 1980
MICHAEL RODAK, JR., CLERK

No. 80-648

In the Supreme Court of the United States

OCTOBER TERM, 1980

EUROPEAN TRADE SPECIALISTS, INC., AND KUNZLE & TASIN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BRIEN E. KEHOE
General Counsel
Federal Maritime Commission
Washington, D.C. 20573

TABLE OF AUTHORITIES

Page

Cases:

Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 3

Consolo v. *FMC*, 383 U.S. 607 4

Hewitt-Robins Incorporated v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 3

ICC v. *United States ex rel. Campbell*, 289 U.S. 385 4

Port of Boston Marine Terminal Ass'n v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 3

Rivoli Trucking Corp. v. *New York Shipping Ass'n*, 167 F. Supp. 943 3

United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 4

Volkswagenwerk v. *FMC*, 390 U.S. 261 4

Statutes:

Shipping Act of 1916, 46 U.S.C. 801 et seq.:

Section 16, 46 U.S.C. 815 ..... 1, 2, 4

Section 17, 46 U.S.C. 816 ..... 1, 2, 4

Section 18, 46 U.S.C. 817(b)(3) 1, 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-648

EUROPEAN TRADE SPECIALISTS, INC. AND KUNZLE & TASIN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION IN OPPOSITION

Petitioners contend (Pet. 16-17) that the Federal Maritime Commission erred by failing to enforce their common law claims in an administrative proceeding brought under the Shipping Act of 1916.

1. Petitioners European Trade Specialists, Inc., a shipper, and Kunzle & Tasin, its consignee, filed a complaint with the Federal Maritime Commission, alleging that they had been overcharged by Prudential-Grace Lines on a shipment of products. Petitioners asserted that the overcharge was unreasonably prejudicial and unjustly discriminatory, in violation of Sections 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 815 and 816. They also claimed that the overcharge was the result of a misclassification of the commodity involved under the carrier's tariff, in violation of Section 18(b)(3) of the Act, 46 U.S.C. 817(b)(3). Petitioners

further charged that the Hipage Company, a freight forwarder, had granted an unreasonable preference under Section 16 and engaged in an unreasonable practice under Section 17, because it breached its fiduciary duty when it prepared the bill of lading and consented to the excessive charge without consulting with petitioner European Trade Specialists (Pet. App. xxiv).

Although the alleged overcharge was only $2,532, petitioners sought consequential damages totalling over $247,000. They also demanded additional unspecified "punitive" damages in light of the alleged "aggravated circumstances" involved.

The Commission held that the carrier had misclassified the shipment, and awarded petitioners the amount of the overcharge ($2,532) plus interest ($1,038) under Section 18(b)(3) of the Act (Pet. App. xi-xviii). The Commission found no violation of Section 16, however, because petitioners failed to show that the overcharge prejudiced them by conferring any competitive advantage on other shippers (Pet. App. xxxiii-xxxxi, lii-lvi). The Commission further found that the carrier had not violated Section 17 of the Act, either by discrimination (since the carrier favored no competitor) or by unreasonable practices (since the carrier was not obligated to adhere to an agent's rate quotation as petitioners claimed) (Pet. App. lvi-lxii). Finally, the Commission found that the freight forwarder had not violated Section 17, since no "practice" of failing to notify shippers of unanticipated increases in charges was proven (Pet. App. xvii).[1]

---

[1]The administrative law judge found that the freight forwarder had in fact contacted petitioner European Trade Specialists regarding the reclassification of the cargo (Pet. App. ix).

The court of appeals affirmed in a per curiam judgment, stating that it was of the view "that the order of the Federal Maritime Commission is supported by substantial evidence, is not arbitrary or capricious, and is otherwise free of reversible legal error" (Pet. App. iv).

2. There is no merit to petitioners' contention (Pet. 16-17) that the Shipping Act incorporates all common law rights and remedies that shippers and their consignees may have against carriers and freight forwarding agents. As the Commission noted, the Act was not intended to supplant all "principles of common law" applicable to contracting parties or the principal-agent relationship (Pet. App. xxxx). The Act forecloses common law remedies only to the extent that they are inconsistent with it; otherwise those remedies survive and may be enforced in the courts. See generally *Hewitt-Robins Incorporated* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 87-88 (1962).

Contrary to petitioners' assertion (Pet. 17-18), the doctrine of primary jurisdiction did not foreclose their common law remedies, if any. Even if a court entertaining petitioners' common law claims were required to refer certain issues to the Commission pursuant to the primary jurisdiction doctrine (*Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69 (1970)), the referring court still would retain jurisdiction to award appropriate relief on the original complaint after the administrative process had run its course. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-224 (1966).[2] Since petitioners did not file any proceeding in an appropriate court to enforce their common law rights, this case plainly is not an appropriate

---

[2] *Rivoli Trucking Corp.* v. *New York Shipping Ass'n*, 167 F. Supp. 943 (S.D. N.Y. 1957), relied on by petitioners, is no longer viable authority following this Court's decision in *Carnation*.

vehicle for defining those common law rights. And since they have sought no judicial relief, there is no merit to their assertion that they suffered a wrong without a remedy.[3].

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

BRIEN E. KEHOE
General Counsel
Federal Maritime Commission

DECEMBER 1980

---

[3]Petitioners also argue (Pet. 20-21), in reliance on *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968), that the Commission erroneously required a showing of competitive harm under Sections 16 and 17 of the Act. But in *Volkswagenwerk*, this Court specifically pointed out that the Commission applies a "competitive relationship" analysis in cases such as this, involving ocean freight rates. *Id.* at 279-280; see also *id.* at 292-293 (Harlan, J., concurring).

Petitioners further contend (Pet. 22-23) that the Commission misconstrued the statutory requirement that freight forwarders "observe and enforce" reasonable practices, and failed to apply the proper measure of damages under *Consolo* v. *FMC*, 383 U.S. 607, 622 (1966). However, neither of these claims was presented to the Commission, and there is no need for this Court to review them now. See, *e.g.*, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952). We note, moreover, that *Consolo* was a discrimination case, and the measure of damages traditionally has been different in simple overcharge cases. See, *e.g.*, *ICC* v. *United States ex rel. Campbell*, 289 U.S. 385, 389-390 (1933).